Supreme Court, U. S.
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No. 73-671

In the Supreme Court of the United States

OCTOBER TERM, 1973

MAYER PAVING AND ASPHALT COMPANY, an Illinois corporation, and **LEE O. MAYER**, sole surviving partner of Mayer Paving Company, a co-partnership,

Petitioners,

vs.

GENERAL DYNAMICS CORPORATION, a Delaware corporation, and **MATERIAL SERVICE CORPORATION**, a Delaware corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITIONERS' MOTION FOR LEAVE TO FILE AN OUT-OF-TIME PETITION FOR REHEARING

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On January 14, 1974, the Court denied the petition for certiorari herein. The petition for leave to file an out-of-time petition for rehearing should be denied for the basic reason that petitioners are seeking to present an issue which was not raised in the courts below or even in the

petition for certiorari here; indeed it was not even alluded to until petitioners' Supplemental and Reply Brief in this Court.

The Petition for Rehearing asserts (p. 4) that the Ninth Circuit held in *Copp Paving Co.* v. *Gulf Oil Co.*, 487 F. 2d 202 (1973), cert. granted, March 25, 1974, No. 73-1012, that the commerce requirements of the Robinson-Patman Act were satisfied "because the highways were instrumentalities of Interstate Commerce," and that the "identical issue" was resolved against plaintiffs in the instant case. The petitioners do not point out, because they cannot, where they had previously made such an argument in this litigation. The fact is that no such point was presented by petitioner in the lower courts, and the so-called "identical issue" was never passed upon by them. Thus the *Copp* case did not create a supervening conflict with the decision below.

A. The authorities are legion that a question cannot be presented to this Court unless it was both properly raised below (*e.g. Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330 (1967); *Lawn* v. *United States*, 355 U.S. 339, 362 (1958); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 (1970); *Fuller* v. *Oregon*, 42 L.W. 4770, 4773, n. 11 (1974)), and is included in the questions presented in the petition for certiorari (*e.g. Irvine* v. *California*, 347 U.S. 128, 129 (1954); *Namet* v. *United States*, 373 U.S. 179, 190 (1963); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 177-179 (1938); Rule 23 (1)(c)). These principles are essential to the effective functioning of a system of appellate administration.

Both of these principles are applicable here, as we show below.

Furthermore, this case does not fall within the rare exception to the general rules, where parties could not

be expected to anticipate a change in doctrine and therefore have good reason for not raising a question prior to hearing in this Court. *E.g., Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313, 320 n. 6 (1971); *Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375, 378-380 n. (1970); *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938). The notion that construction of interstate highways may be relevant in determining what is interstate commerce in some context* is not a novel one which petitioners could not have foreseen during the trial and appeal of this case—*if* the facts as to petitioners' business operations, or any major part of them, had made it applicable.

Thus the fact that this Court has granted certiorari in *Copp,* where on a different record the last mentioned point had been presented in the trial court and on the appeal, does not justify petitioners here in first raising the question at this belated time.

B. In the *Copp* case the Court of Appeals held that "the production of asphalt for use in interstate highways rendered the producers 'instrumentalities' of interstate commerce and placed them 'in' that commerce as a matter of law". (487 F. 2d at 204.) One of the questions presented to this Court in the *Copp* case challenges that ruling.

This case, insofar as the commerce requirements of the Robinson-Patman Act are concerned, was tried by petitioners, submitted to the jury by the trial judge at their behest, and appealed to the Seventh Circuit on the entirely different theory that the case was similar to and governed by *Moore* v. *Mead's Fine Bread Co.,* 348 U.S.

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* Whether that is sufficient to satisfy the commerce requirements of the Robinson-Patman Act is the issue before the Court in *Copp.*

115 (1954). Indeed *Moore* seems to have been the only case relied upon in the commerce argument in petitioners' two briefs in the Court of Appeals. The *Moore* case involved bread, not a commodity used in or on an instrumentality of commerce such as a highway.

In its memorandum opinion (Petition, 24a, 26a) the District Court described the theory on which this case was tried and went to the jury on the "in commerce" issue:

> "The plaintiff's theory of the case is based on the Supreme Court decision in the case of *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 114 (1954) * * * the court let this case go to the jury on the *Moore* v. *Mead* theory with the idea of obviating a need for a second trial, if it is the judgment of the Court of Appeals that *Moore* controls."

On appeal, petitioners argued to the Seventh Circuit: "We submit (1) that the requisite commerce within the meaning of §2(a) was established in this action under the principles announced in *Moore* v. *Mead's* * * *" (Br. pp. 30-31). The Court of Appeals described petitioners' position as follows (Petition 4a, 486 F. 2d at 766):

> "Mayer Paving contends in reliance upon *Moore* that, since Material Service sold to a number of firms in Indiana at prices lower than those given Mayer Paving, the third commerce requirement has been satisfied."

It is thus clear that in the District Court and the Court of Appeals petitioners presented no argument based upon the interstate nature of the projects they were constructing.

The petition for certiorari again relied exclusively on the *Moore* v. *Mead's* theory upon which petitioners had relied at the trial and on appeal. The company was de-

scribed as an asphalt manufacturer and asphalt paving contractor (p. 4), but the petition did not say anything at all either in the Statement or Argument about whether the company did any *interstate* asphalt highway paving or which pertained to the Robinson-Patman question as to which certiorari has been granted in *Copp*.

In their Supplemental and Reply Brief (pp. 2-4) petitioners tried to convince the Court that there was a conflict between the Ninth and Seventh and Fifth Circuits. Petitioners asserted (p. 3) that the conclusion of the Ninth Circuit in *Copp* was "diametrically opposite" to that of the Seventh Circuit in this case and urged that as a reason for this Court to grant its Petition for Certiorari. However, in their discussion of *Copp*, petitioners did not suggest they met the "in commerce" requirements of the Robinson-Patman Act because some of their asphalt or some of the stone purchased from respondents might have been used on some highway or road which might be described as an instrumentality of commerce. On the contrary, petitioners stuck to their *Moore* v. *Mead's* theory and argued that the "conflicts" they perceived "resulted because *Moore* v. *Mead's* has been consistently misread by the lower courts * * *" (p. 4).

C. Nor was that question explored in the record in this case. Petitioners' Amended Complaint, though referring to their business generally as the paving of roads, highways, driveways, tennis courts and "other such facilities" (App. 14-15), did not claim that any of the facilities or projects were interstate or in interstate commerce, and, as has been shown, none of petitioners' contentions were based on that theory. As a result, although the general nature of petitioners' business was described at the trial, neither party made any effort to introduce

testimony or argument with respect to whether or not the paving projects themselves could be said to be in interstate commerce.

Mr. Mayer testified that "the majority of our work was parking lots", including Soldier's Field, that the company also paved driveways and provided paving for a number of hospitals and the Federal Building in Chicago, that "we would do mainly street jobs from the City of Skokie or the City of Niles or Des Plaines or Park Ridge, up in that area," that "we also did occasionally, not often, but once or twice a year we would get a State job from the State of Illinois from the State Highway Department", and that "we did resurfacing and repair work at the Illinois Tollways" (Tr. 791-793). The "roads and municipal work"—that is the State and local work together—was estimated to amount to between 25 and 35 per cent of the work done (Tr. 794), of which the work for the State seemingly was a small part.

No mention was made of the interstate character of the roads upon which petitioners worked. No point was made of this at any time, nor did petitioners make any effort to establish what proportion of their work related to interstate roads or whether such roads were included in the few jobs obtained from the State.

The record here, therefore, does not establish that any "substantial amount" of petitioners' operation related to interstate highways. On the contrary, most of it clearly involved the paving of parking lots, driveways, athletic facilities and streets in Chicago suburbs.

D. Petitioners rely on the principle that " 'the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our

rules'. *United States* v. *Ohio Power Co.*, 353 U.S. 98, 99". *Gondeck* v. *Pan American Airways*, 382 U.S. 25, 26-27 (1965). But no interest of justice is properly invoked by an unsuccessful plaintiff in the asphalt paving business who seeks to reopen a case brought to trial and appealed on one theory because another party, who happens also to be in the asphalt paving business, has successfully petitioned this Court for a writ of certiorari in a case decided on a completely different theory.

A threshold inquiry in determining when the interest in finality of litigation must yield to the interests of justice is whether the party seeking to reopen his case can point to an intervening case in which *the same issue* was decided differently, *e.g. Gondeck* v. *Pan American Airways, supra.* And sometimes even getting over that hurdle is not enough. See *Weed* v. *Bilbrey*, 400 U.S. 982 (1970). Petitioners, as we have seen, do not even reach that first hurdle.

The lack of merit in petitioners' motion is underscored by the fact that it amounts to nothing more than a plea that the Court reread Petitioners' Supplemental and Reply Brief filed many months ago. The motion requests that the Court read the attached Petition for Rehearing for a demonstration of why the issues in *Copp* are "identical" to those raised in the instant case (p. 2). The Petition for Rehearing then "respectfully refers the Court" to the Supplemental and Reply Brief where the "relevance of *Copp* to the instant action" is inaccurately said to be "thoroughly discussed" (p. 4). All that the Petition for Rehearing adds is the incorrect statement that the two cases involved identical issues. Obviously, the interest of "finality of litigation" must prevail when

a litigant desiring to reopen a case has nothing new to say. See Sup. Ct. Rule 58(2), (4).

For all of the above reasons respondents respectfully submit that Petitioners' Motion for Leave to File an Out-of-Time Petition for Rehearing should be denied.

Respectfully submitted,

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